

**BEFORE THE PUBLIC SERVICE COMMISSION
OF THE STATE OF DELAWARE**

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| IN THE MATTER OF THE APPLICATION |) | |
| OF DELMARVA POWER & LIGHT |) | |
| COMPANY FOR APPROVAL OF A |) | PSC DOCKET NO. 17-1094 |
| PROGRAM FOR PLUG IN VEHICLE |) | |
| CHARGING (FILED OCTOBER 19, 2017) |) | |

ORDER NO. 9426

AND NOW, this 16th day of July 2019:

WHEREAS, on October 19, 2017, Delmarva Power & Light Company (“Delmarva”) filed with the Delaware Public Service Commission (“Commission”) an application for approval of a voluntary program for plug-in electric vehicle charging (“Application”), which included Appendix E, a compilation of letters of support;¹ and

WHEREAS, on October 24, 2017, the Delaware Division of the Public Advocate (the “DPA”) filed its Statutory Notice of Intervention pursuant to 29 *Del. C.* § 8716; and

WHEREAS, on December 7, 2017, the Commission approved Order 9150, opening this docket and establishing, among other things, a deadline for written public comment; the Commission received written comments from ChargePoint, Greenlots, the Caesar Rodney Institute (“CRI”), the Clean Air Council, Reach Riverside,² and one member of the public; and

WHEREAS, CRI, DNREC, and Sierra Club timely petitioned for, and were granted, leave to intervene; however, no other entity which submitted public comments sought and was granted leave to intervene, and none was a party to this docket;³ and

¹ The following entities filed letters of support: Delaware Department of Natural Resources and Environment Control, Division of Climate & Energy (“DNREC”); Delaware Department of Transportation; Edison Electric Institute; GridWise Alliance; University of Delaware, College of Earth, Ocean and Environment; Delaware State University; and General Motors. *See Application, Appendix E, Docket No. 17-1094.*

² The Commission acknowledges that Reach Riverside’s written comments were submitted after the Commission-established deadline for written public comment had expired.

³ The University of Delaware filed a petition to intervene after the prescribed deadline. Its petition was denied.

WHEREAS, in accordance with the procedural schedule, and amendments thereto, the parties conducted discovery and filed multiple submissions of prefiled testimony; and

WHEREAS, prior to the rescheduled evidentiary hearing, Delmarva, the DPA, and the Commission Staff (“Staff”) reached a settlement; DNREC, CRI, and Sierra Club did not join the settlement as signatories but none opposed the settlement; and

WHEREAS, on February 28, 2019, Senior Hearing Examiner Mark Lawrence (the “Hearing Examiner”) conducted an evidentiary hearing on the proposed settlement, during which Delmarva, the DPA, Staff, and CRI testified that the settlement was in the public interest; and

WHEREAS, April 11, 2019, the Hearing Examiner issued proposed findings and recommendations (“PF&R”) in this docket; and

WHEREAS, on April 24, 2019, the DPA submitted comments on the PF&R, emphasizing that while it had no issue with the Hearing Examiner’s recommendation that this Commission approve the proposed settlement, it had the following concerns:⁴

(a) the PF&R included a 16-page of nearly verbatim recitation of public comments which were not part of the evidentiary record on which this Commission must base its decision; moreover, the public comments may have been included to persuade this Commission to reach a certain conclusion;

(b) while in this case the Commission is considering a settlement supported by the signatories and not opposed by any intervening party, the DPA was concerned that approval here could lead to inclusion of detailed public comments in a contested matter; and

(c) the appropriate way to address public comments in proposed findings and recommendations is by way of a brief summary of comments timely received; and

⁴ DPA Comments on PF&R, April 24, 2019.

WHEREAS, on May 1, 2019, Staff filed comments on the PF&R, stating as follows:⁵

(a) the Commission should approve the settlement, but either strike the 16 pages of public comments or include only a summary of those public comments;⁶

(b) the PF&R's "Findings and Recommendations" made no reference to the public comments, and the PF&R's "Summary of Evidence" stated that only the parties' positions, not the public comments, constituted "substantial evidence" to approve the settlement;⁷

(c) the Commission's rules of practice and procedure, specifically 26 *Del. Admin. C.* § 1001-2.18.1, require only a summary of the evidence;⁸

(d) the public comments were defined as "filings" under 26 *Del. Admin. C.* § 1001-1.7.9 and, because they alleged facts that are not otherwise in the record, they "must be accompanied by a signed, sworn verification" in accordance with 26 *Del. Admin. C.* § 1001-1.7.2; however, none of the public comments included a verification;⁹ and

(e) none of the public commenters testified at the February 28, 2019 evidentiary hearing;¹⁰ and

WHEREAS, on May 1, 2019, DNREC filed comments addressing the DPA's April 24, 2019 comments;¹¹ and

WHEREAS, the DPA objected to DNREC's May 1, 2019 comments as improper under 29 *Del. C.* § 10126(b) and Order No. 9382;¹² and

⁵ Staff Comments on PF&R (May 1, 2019).

⁶ *Id.* at 2.

⁷ *Id.* at 1.

⁸ *Id.* at 2.

⁹ *Id.*

¹⁰ *Id.*

¹¹ DNREC Comments on PF&R (May 1, 2019).

¹² In Docket No. 17-0978, this Commission determined that "the 'exceptions, comments and argument' that a party is authorized to submit to an agency subject to the APA are those that address 'the proposed order,' not the exceptions, comments and argument submitted by another party." Order No. 9282 (May 21, 2019) at Ordering Paragraph 5. (internal citation omitted).

WHEREAS, May 21, 2019, DNREC filed redacted comments to the PF&R, stating as follows:¹³

(a) DNREC believes including the 16-page detailed public comments is consistent with the Hearing Examiner's delegated authority and this Commission's requirement under 26 *Del. Admin. C. § 1001-1.7.9* that the PF&R provide a "summary of the evidence";¹⁴ and

(b) "robust inclusion of public comments is appropriate in all instances give the public impact of the issues addressed by [this Commission] (including this Docket) and the contemplation of public notice and participation in [this Commission's] proceedings, as established in [this Commission's] Rules of Practice and Procedure, [this Commission's] governing statute, and the Administrative Procedures Act[]";¹⁵ and

WHEREAS, on June 4, 2019, this Commission heard oral argument on the issue of including the 16-page public comments; Delmarva, the DPA, Staff, DNREC, and CRI presented their respective arguments, with CRI supporting the DPA's and Staff's positions; and

WHEREAS, this Commission rejected Staff's, the DPA's, and CRI's arguments and approved Order No. 9357 as submitted with the PF&R, including the 16-page public comments portion; and

WHEREAS, on June 11, 2019, the DPA filed a Motion for Rehearing ("Motion") of this Commission's June 4, 2019 determination and requested approval of an amended Order No. 9357 "to excise the 16 pages of recitation of public comment and replace it with a summarization of the public comment received;"¹⁶ and

¹³ DNREC Redacted Comments on PF&R (May 21, 2019).

¹⁴ *Id.* at 1.

¹⁵ *Id.* (internal citation omitted).

¹⁶ DPA Motion at p. 1.

WHEREAS, in its Motion the DPA argued that a rehearing was appropriate because the Commission “misapprehended the law or facts in a manner that affected the outcome of the decision, and [the] purpose [of a rehearing] is to allow the tribunal an opportunity to correct errors prior to appeal;”¹⁷ and

WHEREAS, the Motion set forth the following grounds:

(a) the Commission erred in approving Order No. 9357 as submitted, including the 16 pages of public comment, because Order No. 9357 provided no explanation for the rejection of the DPA’s and Staff’s positions and its apparent acceptance of DNREC’s position regarding inclusion of public comment; consequently, a reviewing court would have no basis on which it could determine whether the Commission properly exercised its discretion;¹⁸

(b) the Commission may have misunderstood the role of public comments in a case decision as distinguished from its role in promulgating regulations: the Administrative Procedures Act (“APA”) does not require an agency to solicit public comment for case decisions; an agency is only required to publish notice of the evidentiary hearing for case decisions;

(c) the 16 pages of public comments were not evidence because none of the public commenters sought and obtained leave to intervene and the public comments were not presented as sworn statements and no party had the opportunity to cross-examine the proponents of those comments; accordingly, due process precluded the Hearing Examiner’s consideration of or reliance on those public comments in formulating the PF&R; and

¹⁷ DPA Motion at ¶12 (citing *Ramon v. Ramon*, 963 A.2d 128, 139 (Del. 2008); *City of Wilmington v. Kostyshyn*, 2015 WL 6326103, at *2 (Del. Super. Oct. 16, 2015); *Edgewater Growth Capital Partners L.P. v. H.I.G Capital, Inc.*, 2013 WL 1707877, at *1 (Del. Ch. April 18, 2013).

¹⁸ *Id.* at ¶13.

(d) viewing the 16 pages of public comments in their proper context as being no more than comments – not evidence – a question arises as to whether their inclusion may influence this Commission's deliberations in this matter; and

WHEREAS, on June 17, 2019, DNREC filed its response to the Motion;¹⁹ and

WHEREAS, on June 18, the Commission heard oral argument and denied the Motion;

DELIBERATION AND DECISION

Although the Commission denies the DPA's Motion for Rehearing, our ruling includes specific determinations made at the June 18, 2019 regularly scheduled meeting. First, the Commission acknowledges that 16 pages of public comments is not mentioned and formed no basis in the parties' settlement agreement ("Settlement"). The Commission further acknowledges that 16 pages of public comments were not part of the Hearing Examiner's finding of substantial evidence in approving the Settlement. In turn, this Commission determined that "they're not part of the record ... [and] we [did not] consider them as a basis for our [approval of the] settlement."²⁰ To be clear, the 16 pages of public comments are not evidence²¹ and the decision to leave them in the PF&R is expressly not precedent setting.

ORDER

AND NOW, this 16th day of July 2019, it is hereby ordered that:

1. For the reasons stated herein, the DPA's Motion for Rehearing is denied.
2. The 16 pages of public comments included in the Hearing Examiner's Findings and Recommendations were not relied upon by the Hearing Examiner or this Commission in approving

¹⁹ DNREC Response to DPA's Motion for Rehearing (June 17, 2019).

²⁰ June 18, 2019 Transcript at 333, lines 1-3.

²¹ *Id.* at 338, lines 23-24.

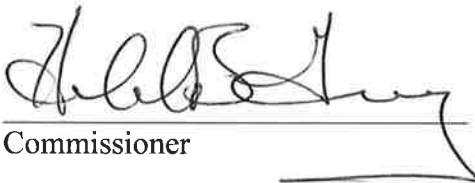
the Settlement in this docket and, therefore, do not constitute evidence or become part of the record; therefore their inclusion is deemed non-precedential.

3. The Commission reserves jurisdiction and authority to enter such further orders as may be deemed necessary or proper.

BY ORDER OF THE COMMISSION:


Chairman



Commissioner


Commissioner


Commissioner


Commissioner

ATTEST:


Secretary

